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November 23, 1998

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket 98-184

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and twelve (12) copies of **Comments of Level 3 Communications, Inc. In Opposition to Application For Transfer of Control.**

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the postage pre-paid envelope provided. If you have any questions regarding this filing please contact me at 204/536-3624.

Sincerely,

Terence J. Ferguson

Terence J. Ferguson

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE CORPORATION,	)	
Transferor	)	
and	)	CC Docket 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee	)	
	)	
For Consent to Transfer of Control	)	

Terence J. Ferguson
Senior Vice President and Special Counsel
Level 3 Communications, Inc.
3555 Farnam Street
Omaha, Nebraska 68131
(402) 536-3624 (Tel.)
(402) 536-3645 (Fax)

November 23, 1998

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EXECUTIVE SUMMARY

1. This merger, in combination with the SBC/Ameritech merger, will create a local exchange market dominated by only four companies, with two giant companies controlling over two-thirds of the access lines in this country and a higher proportion of business lines. In such a market, it is very unlikely that the two giants will compete against each other, since each will fear retaliation from the other for any serious competitive foray into the other's region. GTE presently has out-of-region competitive plans, and is presently positioned to become a serious competitor with the RBOCs whose service areas are close its service areas. Moreover, GTE's predominantly suburban and rural service areas would not offer an attractive target for retaliation by any RBOC GTE chooses to challenge. But the merger, by bringing into the company's home region New York and the Eastern seaboard, an area teeming with lucrative business customers, would guarantee retaliation for any serious out-of-region competition campaign by the combined Bell Atlantic-GTE. Given the prospect of retaliation, the combined company is likely to participate in the type of tacit, market-sharing arrangement that is typical of markets dominated by only four companies, where each participant refrains from serious competition with the others out of fear of retaliation.

In addition, the merger will increase the incentive of the merged company not to cooperate with market-opening measures. Any such cooperation would serve as a precedent for the entire company's home region; and when that region comprises one-third of all access lines in the country, there will be an increased incentive not to cooperate. The merger will combine a company which still needs Section 271 approval to enter the long-distance market and thus has at least some incentive to cooperate (Bell Atlantic), with a company that does not need such approval, has no incentive to cooperate and has a record reflecting that fact (GTE). Given the huge home region that the merged company will have to defend against competition, it is likely to adopt the harder-line GTE attitude, to the detriment of market-opening measures and local exchange competition.

2. The anti-competitive effects of the merger cannot be alleviated by conditions regulating the merged company's performance. Even if enforced (and there is some doubt they could be), such conditions could not be drafted to cover the wide variety of tactics the merged company can adopt to delay and forestall competitive access and interconnection – a problem that will be exacerbated as new technologies create new access and interconnection requirements, engendering new tactics of delay and obstruction. The only feasible way to alleviate the anticompetitive effects of this merger is to require a structural solution, which would separate the merged company from control of bottleneck facilities (loops and wire centers), while leaving it in control of non-bottleneck facilities (such as switches and transport lines). Structural reform would be an appropriate precondition of the merger, since it would remove the merged company's ability to obstruct and discriminate against local exchange competitors, thereby addressing in an effective manner the basic competitive problem that this merger would otherwise aggravate.

3. The merger is not likely to benefit the public by turning the merged company into a vigorous competitor in other ILECs' regions, because the threat of retaliation will be a strong deterrent in a market dominated by only four huge companies. If an out-of-region campaign is needed to enable the merged company to offer its current business customers with satellite offices in other regions a nationwide package, that campaign is likely to be limited to such

customers, without reaching smaller business and residential customers. Such an out-of-region campaign would be of limited public benefit, since it would be confined to the one market segment where significant competition is beginning to develop, leaving untouched the smaller business and residential customers who most need competition and lack it now.

Moreover, both GTE and Bell Atlantic are already huge companies, individually possessing sufficient assets and expertise to support an out-of-region competitive campaign. The merger is not needed.

Nor will the merger benefit the public by bringing additional competition to the long-distance and wireless markets, both of which are already competitive.

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	)	
For Consent to Transfer of Control	)	

**COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.
IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL**

Level 3 Communications, Inc. ("Level 3") is a communications and information services company that is building an advanced Internet protocol technology-based network across the U.S., connecting 50 cities. Level 3's network is scheduled to be completed in phases by 2001. The company also plans to build local networks in 50 cities across the country and to interconnect these city networks with its national long distance network. Level 3 plans to begin providing services in as many as 15 major U.S. cities by the end of 1998, leasing local and interstate facilities until such time as sections of its network are constructed and can replace leased lines.

Level 3 opposes the proposed merger. If this merger and the SBC-Ameritech merger are approved, two giant companies will emerge, with bottleneck control over two-thirds of the access lines in the country as well as most of the major urban centers. The merger will decrease the likelihood of meaningful competition developing in the local exchange market, by enhancing the incentive and ability of these giant companies to exclude competitors from significant use of these access lines. The merger will also deter these companies from bringing meaningful competition to the local exchange market by competing in each other's territory. The Commission should approve this merger only if the companies divest themselves of their bottleneck facilities and thereby create the structural basis for meaningful local exchange competition.

I. THE MERGER WILL SOLIDIFY THE INCUMBENTS' MONOPOLY CONTROL OF LOCAL MARKETS AND LESSEN THE CHANCE THAT LOCAL COMPETITION WILL DEVELOP.

If this merger and the SBC-Ameritech merger are both approved, the local exchange markets in this country will be dominated by two giant companies, which together will control over two-thirds of the access lines in the country including most of the major urban centers. The combined Bell-Atlantic-GTE will control some 63 million access lines,[1] or over one-third of the access lines in the country. If this merger and the SBC/Ameritech merger are approved, the two companies will share between them over 67% of the access lines in the country.[2] and a larger share of business access lines.[3]

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[1] "Bell Atlantic and GTE Agree to Merge," Press Release July 28, 1998. http://www.ba.com/nr/1998/Jul/19980728001.html

[2] FCC, Statistics of Common Carriers, Table 2.10.

[3] As an indicator of their dominance in the market for business customers, the two companies would serve 399 of the Fortune 500 headquarters. Bell Atlantic serves 175 Fortune 500 headquarters. "Bell Atlantic and GTE Agree to Merge," Press Release July 28,1998. SBC claims that "224 Fortune 500 companies are headquartered in the 13 states served by SBC, Ameritech, and SNET." Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferee, to SBC Communications Inc., Transferor, CC Docket 98-141 ("SBC/Ameritech Merger Proceeding"), Affidavit of James

It is hard to imagine a result more at odds with the Telecommunications Act of 1996. That Act was designed to introduce competition into local exchange markets, not to resurrect the old Bell monopoly. The result is particularly egregious because both GTE and Bell Atlantic have persistently resisted implementation of the market-opening measures required by the Act. The Commission should not approve a consolidation of two companies which have demonstrated their dedication to resisting inroads in their monopolies, since the merger will give them increased market power and an increased incentive not to allow competition in their own regions and not to engage in meaningful competition in each other's territories.

Bell Atlantic and GTE argue they do not presently compete against each other and thus the merger is not anticompetitive. However, under section 7 of the Clayton Act, which the Commission must consider in reviewing proposed mergers,[4] the Commission is required to consider "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." United States v. Philadelphia National Bank, 374 U.S. 321, 362 (1963). The impact of the merger on future competition is a particularly important consideration in light of the dynamic and changing telecommunications market and the purpose of the Telecommunications Act of 1996 to bring competition to the local exchange market. Mergers which create a local exchange market dominated by two giant ILECs will harm future competition because the dominant companies will have increased incentives and

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S. Kahan, ¶ 49 (atch. to SBC-Ameritech Description of the Transaction, Public Interest Showing and Related Demonstrations ("SBC/Ameritech Public Interest Statement").

[4] Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket 97-211, Memorandum Opinion and Order (Sep. 14, 1998) ("MCI/WorldCom Merger Order"), ¶ 9.

ability to resist inroads by competitors, and decreased incentives to compete with in each other's territory.

A. The merger will increase the incentive of the merged company to resist market-opening measures.

In the Bell-Atlantic-NYNEX merger case, the Commission recognized that a merger between two large ILECs may reduce their willingness to cooperate with market-opening measures. That is because "[o]n any particular issue . . ., one incumbent LEC may have an incentive to cooperate with its competitors, contrary to the interests of the other LECs."[5] But the precedent set by cooperation on that issue "will reduce the others' ability to refuse to cooperate the same way."[6] "If two major incumbent LECs merge, however, this incentive may be reduced. To the post-merger incumbent LEC, cooperation in one area may have untoward consequences in another and cooperation may be against the firm's overall interests."[7] As the Commission noted, "[t]his may result in the post-merger LEC cooperating less than the pre-merger incumbent LECs would have in enabling competition to grow."[8] While that factor was not sufficient to require disapproval of the Bell Atlantic-NYNEX merger, the Commission considered the issue close and thought further mergers might raise serious concerns.[9]

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5 Applications of NYNEX Corporation, Transferor and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 FCC Rcd 19985 (1997) (" Bell Atlantic/NYNEX Merger Order"), ¶ 154.

6 Id.

7 Id.

8 Id.

9 Bell Atlantic/NYNEX Merger Order, ¶ 156.

The present merger involves an additional element, not present in Bell-Atlantic/NYNEX, which enhances the likelihood that the merger will harm competition by reducing incentives to cooperate with market-opening measures. At present, Bell Atlantic is seeking Section 271 approval for entry into the long-distance market in New York State, and presumably will do so in other States if its application for New York State is approved. Thus Bell Atlantic has at least some continuing incentive to agree to market-opening measures. By contrast, GTE is already in the long-distance market. As a consequence, GTE has taken an extremely recalcitrant attitude toward competition.[10] GTE's "scorched-earth' tactics have been totally successful in keeping significant competition out of its service areas.[11] After the merger, the merged company will have to consider whether the possible benefits from agreement to market-opening measures, in

[10] Soon after the 1996 Act was passed. Ameritech's CEO was quoted as saying: "The big difference between us and them [GTE] is they're already in long distance. What's their incentive to cooperate?" "Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay," Washington Post, October 23, 1996, at C12.

[11] So far, GTE's tactics have been overwhelmingly successful. In its response to the Second CCB Survey on the State of Local Competition, GTE reported the total of local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines GTE provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: California - 0.9%; Florida - 1.7%; Hawaii - .02%; Illinois - .005%; Indiana - .0007%; Kentucky - 0.2%; Michigan - 0%; North Carolina - 0.2%; Ohio - .004%; Oregon - .03%; Pennsylvania - .01%; Texas - 1.1%; Virginia - .02%; Washington - .02%; Wisconsin - .06%. http://www.fcc.gov/ccb/local-competition/survey/responses. Of the total lines GTE provided other carriers, slightly under1% were UNEs. Id.

The comparable figures for Bell Atlantic, while also disturbingly low, are an order of magnitude higher than GTE's figures. The number of total local lines Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland - 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. Id. Of the total lines Bell Atlantic provided other carriers, 12.3% were UNEs. Id..

terms of obtaining long-distance approvals under Section 271, are offset by the precedent set in terms of opening up the market in GTE's hitherto impenetrable service areas. The merged company may well conclude that the benefits of cooperation in terms of Section 271 approval are not worth the cost in terms of losing control over access lines covering one-third of the country and a larger proportion of major urban centers.

B. The merger will increase the incentive of the merged company to maintain the present geographical division of markets between ILECs.

The Supreme Court has recognized that, as the number of firms in an industry becomes fewer, "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge."[12] As stated by the Department of Justice's 1992 Merger Guidelines, "[a] merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers."[13] The Commission has also recognized that "[a]s the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers."[14]

This merger, in conjunction with the SBC-Ameritech merger, will reduce the number of significant participants in the local exchange market from six to four (Bell Atlantic/GTE, SBC/Ameritech, US West and BellSouth). In the past, the courts and enforcement agencies have

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12 United States v. Aluminum Company of America, 377 U.S. 271, 280 (1964).

13 1992 Horizontal Merger Guidelines, § 2.1, 57 Fed. Reg. 41552, 41558 (September 10, 1992).

14 Bell/Atlantic/NYNEX, ¶ 121.

disapproved mergers where they would reduce the number of significant firms in the market to four and thereby increase the likelihood of tacit collusion.[15]

To date, the present ILECs, with few exceptions, have maintained a geographical division of markets, to the detriment of consumers, by refraining from significant competitive forays into each other's territories – despite the fact that each ILEC has far more assets and far greater managerial and technical expertise in the provision of local exchange service than most CLECs. The present geographical division of markets, however, will not necessarily last. For example, in the SBC/Ameritech merger application, the applicants have told the Commission that the prospect of significant competition from large non-ILEC companies (such as MCI WorldCom) for the local exchange business of their large corporate customers has led them to conclude that they must compete out-of-region for these customers or risk losing their business in-region.[16] The evidence in that case also shows that Ameritech made a serious out-of-region competitive foray into the St. Louis market, and has obtained CLEC certification in several states.[17] GTE acknowledges that it has "an imperative to compete given its island-like service areas in the other Bells' seas," and consequently "already has established a separate corporate unit to plan for entry

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15 FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989) (reduction to four firms "will make it easier for leading members of the industry to collude"); Hospital Corp. of America v. FTC, 807 F.2d 1381, 1387 (7th Cir. 1986) ("As a result of the acquisitions the four largest firms came to control virtually the whole market, and the problem of coordination was therefore reduced to one of coordination among these four.").

16 Affidavit of James S. Kahan, ¶ 13 (atch. to SBC/Ameritech Public Interest Statement)..

17 SBC/Ameritech Merger Proceeding, Ex Parte Letter dated October 13, 1998 from Antoinette Cook Bush, Counsel for Ameritech.

into territory close to its own few urban franchise areas near Los Angeles, Dallas, Tampa, and Seattle."[18] GTE is also "currently testing the use of its own wireless switch in San Francisco to provide local wireline service in SBC territory."[19] In addition to those cities, GTE also shares an MSA or serves neighboring suburbs with several other urban areas presently controlled by various RBOCs: San Francisco, San Diego, Houston, Chicago, Cleveland, Indianapolis, Detroit, Orlando, Jacksonville, and Portland.[20] These areas are natural targets for competitive forays by GTE. GTE's Chairman and CEO has said he is "confident about GTE's ability to succeed in the competitive marketplace <u>without</u> entering into a major transaction or combination with another company. In other words, we can go it alone and win."[21]

But this merger, in conjunction with the SBC/Ameritech merger, lessens the likelihood that the merged companies will find it in their interest to disturb the "mutually beneficial equilibrium" represented by the existing geographical division of markets. In the SBC/Ameritech merger application, the parties candidly acknowledge that they expect any out-of-region competitive foray by the merged company to elicit retaliation by the incumbent LEC.[22] GTE has made it clear that it expects the merged company "to respond in kind."[23] But neither

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18 Application at 7.

19 Kissell Aff't ¶ 13.

20 SBC/Ameritech Public Interest Statement at 2.

21 GTE Corporation, Annual Report 1997, "Chairman's Message" (emphasis in original).

22 SBC/Ameritech Public Interest Statement at 7-8.

23 the President and CEO of GTE recently testified: "The business is evolving quickly to a nationwide market for bundled services, and other local exchange companies such as

GTE and Bell Atlantic, nor SBC and Ameritech, acknowledge the implications a market dominated by two giant companies, each of which is ready to retaliate against competition from the other. Given the prospect of retaliation, the ILEC planning an out-of-region competitive foray has to consider whether the benefits of the possible additional business to be garnered outweigh not only the direct cost of doing business in another ILEC's region, but also the cost of defending against retaliation by that ILEC and the loss of business that might result.

If, for example, GTE/Bell Atlantic were considering a competitive foray into Chicago and Los Angeles, it would have to consider whether the prospective benefits outweigh the losses from a retaliatory raid by SBC/Ameritech into New York City.

In these circumstances, the likely result is that both of the giant ILECs resulting from these mergers will find it mutually beneficial to maintain a geographical division of territories – refraining from competitive forays into each other's territory and continuing to collect the profits from their own monopolies, while avoiding the risk and expense of competitive warfare in each other's territory. This merger, in combination with the SBC/Ameritech merger, lessens the chance that the preliminary signs we are now seeing of a possible break in the present geographical division of markets among the ILECs will actually result in serious inter-ILEC competition.

SBC have made it clear that they intend to compete in Bell Atlantic's region. This merger will allow Bell Atlantic and GTE to respond in kind." Prepared Testimony of Charles R. Lee, Chairman & CEO, GTE Corporation, before the Senate Committee on the Judiciary Subcommittee on Antitrust, Business Rights and Competition, September 15, 1998. A copy is attached.

These considerations are particularly relevant to the merger of GTE with another ILEC. As the Commission has recognized, if a market participant has "something to lose" from competition, it is more likely to participate in tacit market-sharing arrangements.[24] Absent the merger, GTE might not have much to lose by mounting competitive challenges in urban areas such as Los Angeles or Chicago or San Francisco. With its predominantly rural and suburban service areas, GTE would have less to lose if SBC/Ameritech were to retaliate; and SBC/Ameritech might decide that GTE's service areas are simply not an attractive enough target for retaliation.

But the situation changes dramatically once GTE merges with Bell Atlantic. At that point, the possible targets for retaliation include New York City and the entire Boston-Washington corridor – markets teeming with lucrative business customers, presenting an attractive target for retaliation should the merged GTE/Bell Atlantic ignite competitive warfare.

Both SBC and Ameritech, and Bell Atlantic and GTE, have argued that merger is necessary to give them the necessary resources to engage in out-of-region competition. As we discuss in more detail in Point III infra, this argument is specious. All these ILECs have resources and revenues vastly exceeding several CLECs in the market, as well as much more experience in providing local exchange service.

But even if the argument were correct, it would cut the other way. If the larger size of SBC/Ameritech makes it a more credible competitive threat to Bell Atlantic/GTE, that is an additional reason for Bell Atlantic/GTE not to ignite a competitive battle between the two giant

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24 Bell Atlantic/NYNEX Merger Order, ¶ 123.

companies. And for the same reason, the additional resources of Bell Atlantic/GTE would help deter SBC/Ameritech from raiding its territory. For this reason as well, the sheer size and resources of the combined companies increase the incentive to adhere to a tacit agreement not to compete in each other's territory.

The Department of Justice's Merger Guidelines recognize that tacit non-compete agreements are more likely in markets where "detection and punishment likely would be rapid."[25] The Commission has concluded that the local telecommunications market is a likely arena for merger-induced coordinated action, because the incumbent LEC has information about its rival's activities, making it difficult for any participant to "cheat" on a tacit non-compete agreement.[26] The same reasoning applies to the ILECs' geographical division of territories. SBC/Ameritech will obviously know when BellAtlantic/GTE is invading its territories, and vice versa, since each company's CLEC will need to have certification, interconnection agreements, collocation, and in many cases will have to lease local loops, before even beginning to solicit customers in the other's territory. "Cheating" on the ILECs' geographical division of territories will be impossible, making it even more likely that, once two-thirds of the country is in the hands of two giant telecommunications companies, they will never seriously compete in each other's territory.

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25 § 2.12, 57 Fed. Reg. 41552, 41559 (Sep. 10, 1992).

26 <u>Bell Atlantic/NYNEX Merger Order</u>, ¶ 122.

II. THE ADVERSE EFFECT OF THE MERGER ON COMPETITION CANNOT BE ALLEVIATED BY CONDITIONS REGULATING THE MERGED COMPANY'S CONDUCT. STRUCTURAL REFORM IS REQUIRED, AND WOULD BE AN APPROPRIATE PRECONDITION TO MERGER APPROVAL.

The severe competitive concerns raised by creating a company controlling a third of all the access lines in the country are unlikely to be resolved by approving it subject to conditions regulating the merged company's conduct, as was done for Bell Atlantic/NYNEX. Such conditions cannot address the increased incentive the merged company will have to resist market-opening measures. And if the SBC/Ameritech merger is also approved, there is no set of conduct-regulating conditions that can remove the incentive the two giant companies would have not to compete with each other, out of fear of the consequences of retaliation.

Even if merger conditions were complied with after consummation of the merger, it is not possible to draft a set of conditions encompassing the broad variety of obstructive tactics that the merged company might adopt. Conditions can be drafted to ban specific practices; but these are soon evaded by other practices that may differ in specifics but are equally obstructive. Indeed, evasive tactics will proliferate as new and advanced services become more important and new forms of access are required. And while general prohibitions may be written against bad-faith negotiations or unreasonable access conditions or discriminatory practices, there is always room for time-consuming litigation over what is "bad faith" or "unreasonable" or "discriminatory."

Moreover, there is considerable question whether merger conditions would prove to be enforceable. There are already charges that the Bell Atlantic-NYNEX merger conditions have not been complied with. As MCI explained earlier this year in a Complaint filed with this Commission, "Bell Atlantic previously failed to comply with the Merger Order, and continues to do so, through its failure to price unbundled network elements based on forward-looking economic costs. . . . Bell Atlantic has now compounded its complete disregard for the critical market-opening provisions in the Commission's Merger Order by refusing to negotiate in good faith to develop adequate performance standards, remedies, and associated reporting."[27] Once the merger is consummated, it will be impossible to undo as a practical matter. And given the enormous stake the combined company will have in preserving its within-region local exchange monopoly, it will be motivated to violate the conditions for as long as possible, even if compliance orders and fines result.

In its comments filed March 23, 1998 on the Petition of LCI Telecom Corp. for Declaratory Rulings (CC Docket 98-5), Level 3 pointed out that the anticompetitive nature of local exchange markets – which this merger will exacerbate – is unlikely to be resolved without a structural solution that isolates the BOCs from control of the bottleneck loops. Level 3 urged the Commission to explore alternative approaches that effectively separate control of the loop from the BOCs' competitive interests, so that there would be no incentive to limit competitive access to these facilities or to price them in a discriminatory or strategic manner. Level 3 proposed a solution involving divestiture of bottleneck facilities (loops and wire centers) to an independent company while retaining non-bottleneck facilities (including switches and transport facilities) (the "LoopCo" proposal), discussed the alternative of an independent company operating but not owning the bottleneck facilities (the "Independent System Operator" concept),

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[27] Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

and pointed out that other parties, including the BOCs, might have other suggestions worthy of consideration.

The Commission has undoubted authority to impose a structural solution as a precondition of the merger. In the past, the Commission's imposition of structural separation requirements has been sustained where reasonably necessary to achieve objectives within its jurisdiction. Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities (Computer I), 28 FCC2d 267 (1971), aff'd in part and rev'd in part on other grounds, GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). Structural separation is a "permissible regulatory tool" for matters within the Commission's jurisdiction, Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198, 219 (D.C. Cir. 1982), and imposition of pro-competitive conditions to a merger that might otherwise affect competition adversely is well within the Commission's jurisdiction. For example, in the Bell Atlantic-NYNEX merger, the Commission utilized conditions as a means of addressing potential anti-competitive effects,[28] and in the MCI-WorldCom merger, pre-merger divestiture was a significant element in the Commission's finding that the merger would not harm competition by giving the merged company a dominant position in the Internet backbone.[29]

Divestiture is a common remedy to cure the anti-competitive effects of a merger, and may be used to "'pry open to competition a market that has been closed by defendants' illegal

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[28] Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 FCC Rcd 1998, ¶¶ 177 et seq. (1997).

[29] MCI/WorldCom Merger Order, ¶¶ 151-156.

restraints.'" Ford Motor Company v. United States, 405 U.S. 562, 573-74 (1972), quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947). A prominent example of divestiture to remove the incentive and ability to exploit a bottleneck monopoly was the AT&T Consent Decree, which imposed a structural solution to remove the incentive and ability of AT&T to exploit its control of local access lines to discriminate against long-distance competitors. United States v. American Tel. and Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). In that case, as here, the structural remedy met "the requirements for an antitrust remedy . . . [it] effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity." Id., 552 F. Supp. at 153.

The 1996 Act did not alter the Commission's authority to use structural separation as a regulatory tool. Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 13 FCC Rcd 6040, ¶ 55 (1998). Indeed, the 1996 Act highlights the necessity for structural separation, by mandating the competitive access and interconnection that would become less likely to occur if this merger goes forward.

A structural solution would eliminate the incentive and ability of the merged company -- that the merger would otherwise enhance -- to engage in obstructive tactics to foreclose competitive interconnection and network access mandated by the 1996 Act. It would also alleviate the anticompetitive effect of the merger in reducing the likelihood that the giant ILECs will ever compete in each other's territory. A structural solution would directly address these anticompetitive effects, and thus would be an appropriate precondition to approval of this merger.

III. THE MERGER IS NOT LIKELY TO BENEFIT THE PUBLIC BY MAKING THE MERGED COMPANY A MORE VIGOROUS COMPETITOR IN OTHER MARKETS

A. The merged company is not likely to make the local exchange market more competitive.

Bell Atlantic and GTE argue that the merger will benefit local competition, by enabling the merged company to undertake an ambitious campaign to provide facilities-based local competition against other ILECs. They argue that neither merger partner alone could undertake such a campaign, but the merged company can and will.

The argument is not credible. GTE is already a huge company, fully capable of an out-of-region competitive campaign. Its 1997 revenues were $23.2 billion and net income $2.7 billion.[30] Bell Atlantic is also huge, with 1997 revenues of $30.2 billion and net income of $2.4 billion.[31] GTE and Bell Atlantic name AT&T, MCI WorldCom and Sprint as their principal competitors. Of these three, the 1997 figures show that GTE and Bell Atlantic are both larger than Sprint ($14 billion revenue, $952 million net income[32]), comparable to MCI WorldCom ($27 billion revenue, $592 million net income[33]), and smaller than AT&T ($51 billion revenue, $4.3 billion net

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30 GTE Corporation, 1997 Annual Report

31 Bell Atlantic, Investor Information, http://www.bell-atl.com/invest/financial/statements/income annual.htm (visited November 10, 1998)

32 Sprint 1997 Annual Report

33 WorldCom, SEC Form 10-K (1997); MCI, SEC Form 10-K (1997).

income[34]). In terms of both revenues and net income, GTE and Bell Atlantic individually dwarf even the largest companies in the next tier of CLEC competitors.[35] They can hardly argue that they need to merge because one of their competitors (AT&T) is larger than they are. Under that rationale, mergers would always be allowable until only two companies were left in each market. And in any event, AT&T's larger size has not yet resulted in significant success in the local exchange market.

Moreover, the very substantial investments in foreign countries that GTE and Bell Atlantic have made belie the assertion that they are individually incapable of doing business outside of their own regions. GTE's international operations "stretch from British Columbia and Quebec in the north, to the Dominican Republic, Puerto Rico and Venezuela to the south." Public Interest Statement at 14 n.10. Bell Atlantic has wireless investments in Mexico, Italy, Greece, Slovakia and the Czech Republic, and wireline investments in the UK, Thailand, Indonesia and the Philippines." Id. GTE and Bell Atlantic have not explained why, if they can enter new markets abroad without merging, they cannot also do so in this country.

The applicants admit that GTE is already well-positioned to provide facilities-based competition in many cities where its network comes close to the city and/or it is already providing service in an adjacent area. Public Interest Statement at 1-2, 6-7. But, they contend, GTE lacks

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34 AT&T Earnings Commentary: October 26, 1998 3Q 1998 Appendices, http://www.att.com/ir/commentary/983q-cmnt-a.html#appendix-ii

35 A recent Merrill Lynch report estimated that as of the end of the first quarter of 1998, the CLECs collectively had a 3.5% share of the $101 billion annual local market revenues – amounting to approximately $ 3.85 billion. Merrill Lynch, "Telecom Services – Local, CLECs: What's Really Going On" (June 19, 1998), at pp. 5, 9.

the relationship to major corporate customers that Bell Atlantic already has. GTE does not want to compete until it can obtain the advantage of "anchor customers" through a Bell Atlantic connection. Kissell Aff't ¶ 7.

But several of the CLECs competing for large corporate customers do not have the advantage of existing "anchor customers." And yet the Commission has recognized that CLEC competition for large corporate customers is beginning to become significant.[36] Moreover, the "anchor customers" that MCI WorldCom and Sprint have were originally acquired the old fashioned way – by competing for them in the open market. There is no reason why GTE and Bell Atlantic cannot seek "anchor customers" in the same way. Basically, the "anchor customer" argument is a proposal by Bell Atlantic to use the customer relationships it obtained as a local exchange monopolist within its present region to leverage its way into out-of-region markets. Under this proposal, the merged company would be "employing [its] monopoly power as a trade weapon against [its] competitors." United States v. Griffith, 334 U.S. 100, 107 (1948). That does not represent a benefit of the proposed merger; instead, it is another anticompetitive effect.

GTE has ample resources to support an aggressive marketing campaign. It is already in several suburban markets adjacent to prime urban markets now controlled by RBOCs. It is already in a position to offer corporate customers long-distance and advanced data-transmission services. It should not need existing "anchor customer" relationships to mount a credible marketing campaign for out-of-region corporate customers, and to use that campaign as a platform for reaching smaller businesses and residential customers. The fact that it has not done so

[36] MCI/WorldCom Merger Order, ¶¶ 172-182.

probably reflects the fact that the merger route is cheaper and less risky than competitive marketing, and thus will be pursued unless and until the Commission makes it clear that the merger wave in this industry has gone far enough.

Moreover, even if the merged company does engage in out-or-region competition, that competition will be focused on large business customers -- the one segment of the local exchange market which, the Commission has found, is already on the road to becoming competitive. GTE admits that the initial focus of the merged company's out-of-region competition will be to "build on Bell Atlantic's existing account relationships with large businesses." Kissell Aff't ¶ 7. In the MCI/WorldCom Merger Order, the Commission found that, while the incumbent LECs still dominate the larger business market, "they face increasing competition from numerous new facilities-based carriers in serving the larger business market."[37] Thus, to the extent that the merged company's out-of-region competition plan is limited to a segment of the local market that is already becoming competitive – rather than bringing competition to the residential and small business segments where significant competition is not yet on the horizon -- the public benefit is limited.

The applicants argue that once they have built facilities to serve large business customers, they will have a platform from which to mount a credible competitive campaign for small business and residential customers. But other CLECs have built their own facilities to serve large corporate customers, without success in using this platform to bring significant competition to the market for small business and residential customers. In this segment of the market, it is still

[37] MCI/WorldCom Merger Order at ¶ 172.

necessary to lease unbundled loops or engage in resale, and ILEC resistance has been successful in keeping competition based access to UNEs or resale at insignificant levels. Applicants have not claimed that their facilities will avoid the necessity of leasing unbundled loops to reach small business and residential customers, and there is no reason to believe that they will be any more successful at overcoming ILEC resistance than other CLECs have been.

Moreover, the merged company will face an disincentive to expanding any out-of-region competitive campaign beyond the large corporate customers with which Bell Atlantic has an existing relationship. As previously discussed, any out-of-region competitive campaign by the merged company's CLEC would carry the danger of retaliation by the incumbent LEC – a danger other CLECs do not incur, because they have no home region against which retaliation could be targeted. It is likely that, because of the danger of retaliation, the merged company will continue to participate in the present tacit agreement to divide territories, and refrain from any serious out-of-region competition.

SBC and Ameritech have argued that unless they pursue their own large corporate customers out-of-region, they will lose these customers to non-ILEC competitors offering to supply the customer's total communications needs in a nationwide package. If that is right, competition from "outsiders" may break down the present tacit division of territories among the ILECs as to large business customers with headquarters in the competitor's home region. But there is no reason to believe that the tacit division would not still hold as to other market segments. The incumbent LEC will know when the merged company's CLEC is moving from the limited goal of serving customers with which it has an existing relationship within its home region, to the broader goal of competing for the rest of the incumbent's customer base. Thus the incumbent will have ample opportunity to retaliate. And the prospect of retaliation – when added to all the problems that have prevented other CLECs that are not burdened with fear of retaliation from providing significant competition for smaller business and residential customers – is likely to keep the merged company's out-of-region campaign, if it occurs at all, confined to pursuit of large corporate customers.

In short, the merged company, if it competes out-of-region at all, is not likely to bring competition to the segments of the local exchange market that most need it. Thus the claimed public benefit from the merger in the local exchange market is very limited, and not sufficient to outweigh the merger's anticompetitive effects. The solution to the problems of local competition is to enforce the market-opening requirements of the Telecommunications Act of 1996 — not to approve an anti-competitive merger on the basis of a dubious promise that the merged company will successfully become a significant local competitor in markets where other large and well-financed CLECs have not yet been able to overcome the incumbent's resistance to market-opening measures.

B. The merger will not bring significant new competition to the long-distance market.

The applicants claim that the merger will enhance competition in the long-distance market, by enabling the merged company to construct and operate a national long distance network. They assert that there are presently only three "fully national facilities-based carriers" (MCI WorldCom, AT&T and Sprint), and that a fourth national network will add significantly to competition. Public Interest Statement at 4, 18-20.

But in the WorldCom-MCI merger, the Commission concluded that competition in the long-distance market must be assessed in light of the fact that "the supply of transmission capacity is expanding significantly with the construction of four new national fiber-optic networks by Qwest, IXC, Williams, and Level 3."[38] In light of this new capacity, the Commission found that there would be a sufficient number of national facilities-based carriers to "constrain any attempted exercise of market power,." and that "new carriers likely will be able to constrain any coordinated exercise of market power by the incumbents."[39] The Commission concluded that "the coverage of the new networks is sufficient to provide competitive national long distance service."[40]

In short, there will shortly be four additional national networks – not the three the applicants claim. That makes a total of seven national networks. The addition of an eighth national network, in a market the Commission has already found to be competitive, can hardly be claimed as a significant public benefit.

Moreover, the claim that either GTE or Bell Atlantic could not build an eighth network without the merger – assuming the market demand for such a network exists – is not credible. Bell Atlantic and GTE are vastly larger companies than Qwest, IXC, Williams or Level 3 – the companies described by the FCC as building the four new national fiber-optic networks that will guarantee the continued competitiveness of the long-distance market.[41] Nor did these companies

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38 MCI/WorldCom Merger Order ¶ 43.

39 MCI/WorldCom Merger Order ¶ ¶ 51, 64.

40 MCIWorldCom Merger Order ¶ 54.

41 GTE's revenue for 3Q 1998 was $6.4 billion, and Bell Atlantic's was $7.9 billion. Qwest's was $880 million; IXC's $185 million, and Level 3's $106 million. See http://www.gte.com/g/3Q98/table1.html (visited October 21, 1998); http://www.bell-

have the ready-made supply of Fortune 500 "anchor customers" that Bell Atlantic has and GTE is seeking through this merger. The achievement of Qwest, IXC, Williams and Level 3 demonstrates that significant, competition-enhancing network investments can be made without the ready-made customer base that GTE says it needs to acquire.

C. The merger will not bring significant new competition to the wireless market.

Applicants also argue that the merger is pro-competitive in wireless markets, because it will create "a much more geographically extensive wireless system." Statement at 20. However, applicants admit that "several wireless providers are national or almost national in scope and the wireless marketplace is becoming crowded with vigorous competitors." Statement at 21. In addition to the four named by applicants, the Commission in SBC/PacTel identified an additional three "wide-area CMRS combination[s]."[42] In SBC/PacTel, the Commission characterized the pro-competitive effect of the merger in adding an additional wide-area wireless competitor to an already-crowded field as "modest." That is the most applicants here can claim, and the effect is not sufficient to outweigh the anti-competitive effect of this merger on other markets.

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atl.com/invest/financial/quarterly/3q98.html; (visited November 9, 1998); http://www.qwest.net (visited November 2, 1998); http://www.level3.com (visited November 2, 1998); http://www.ixc-investor.com/press.html (visited November 9, 1998).

[42] Application of Pacific Telesis Group, Transferor and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries, 12 FCC Rcd 2624, ¶ 72 (1997) ("SBC/PacTel Merger Order").

ATTACHMENT

Prepared Testimony of
Charles R. Lee, Chairman And Ceo,
Gte Corporation
Before The Senate Committee on the
Judiciary Subcommittee on Antitrust,
Business Rights and Competition

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CHARLES R. LEE, CHAIRMAN & CEO, GTE CORPORATION
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS AND COMPETITION

BODY:
The business rationale for merging Bell Atlantic and GTE reflects a common vision of where the telecommunications business is heading as America enters the 21st century.
First, the major players will compete with one another on a national scale. Second, the ability to provide customers with bundles of services that include some or all of local, long distance, voice, data, and wireless services will become increasingly important. Third, the rapid growth we see today in the data business will continue, and the ability to offer advanced, high-speed data services will be key to competitive success.
The companies that will compete in this nationwide market for bundled telecom services are being formed now. They include the combination of AT&T-TCG-TCI-British Telecom, WorldCom-MCI-MFS-UUNet, Sprint-Deutsch Telecom-France Telecom, and SBCAmeritech. The public policy implications of the Bell Atlantic-GTE merger are equally compelling. The merger will increase competition in all individual segments of the domestic telecommunications market-- including local, long distance, voice, data, wireless, and the Internet--as well as the new emerging nationwide market for a full bundle of state-of-the-art telecom services. Following is a brief discussion of the effect in each market.
Local Phone Service Times have changed since the Bell Atlantic-NYNEX merger. The business is evolving quickly to a nationwide market for bundled services, and other local exchange companies such as SBC have made it clear that they intend to compete in Bell Atlantic's region.
This merger will allow Bell Atlantic and GTE to respond in kind. It will allow the combined company to compete on a national scale, and it will provide a base from which to launch a competitive strike against the other Bell companies. To put it another way, GTE's national presence is the "enabler" that will allow the combined company to compete with Bell companies and other providers in the nationwide market.
This merger involves the best possible combination of local exchange carriers. The local service areas of Bell Atlantic and GTE are complementary. Bell Atlantic provides local service in 12 northeastern and mid-Atlantic states as well as the District of Columbia; GTE provides service almost entirely in states served by other Bell companies. Approximately 95 percent of GTE's local service revenues come from areas outside the states served by Bell Atlantic. GTE has major concentrations of customers in several major metropolitan markets that it shares with other Bell companies, including Los Angeles, Dallas/Fort Worth,

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Seattle, and Chicago.
GTE has been working to develop a competitive local exchange company (CLEC) business to enter these major near-to-in-region markets. Although it initially wanted to attack all of these markets at once, it quickly realized that the limited resources it could devote to these efforts meant it had to focus its efforts. To date, GTE has entered a small handful of markets on a resale basis, all of which are located outside the Bell Atlantic region (in California, Florida, Texas and Washington states). Further steps are on hold because of limited resources and the need for additional development work.
In contrast, GTE is not positioned to be a significant competitor in the states served by Bell Atlantic. GTE's presence in these states is extremely limited. It only has local telephone operations in Pennsylvania and Virginia where it has relatively few customers (722,000 and 687,000, respectively) scattered across a number of low- density service areas. Unlike theother Bell companies, GTE does not share any major metropolitan markets with Bell Atlantic.
Because of these facts, neither Bell Atlantic nor GTE are competing in one another's local service areas. GTE has taken the pro forma step of filing certification applications in some states (including New York, Pennsylvania, and Virginia). But it is not marketing service in those states, and, with the possible limited exception of marketing resold private line services to a handful of business customers, has no plans to do so.
Data, Internet and Long Distance The merger also will strongly promote competition in the data, Internet and long distance segments of the business.
In the data and Internet businesses, combining GTE's Internet backbone interest with Bell Atlantic's customer base will provide the scale needed to build out GTE's own backbone network to compete with the major facilities-based providers in this concentrated segment of the business. GTE is currently the fourth-largest provider of Internet backbone services behind WorldCom, MCI (to be transferred to Cable & Wireless) and Sprint. But GTE's backbone services still are dependent in large part on facilities leased from MCI and WorldCom.
Adding Bell Atlantic's customer base will expand the volume of data and Internet traffic carried over GTE's backbone facilities, and accelerate GTE's ability to build out its own network to make it a stronger competitor to WorldCorn and the other major providers.
Likewise, in the long distance business, the pending merger of MCl and WorldCom would reduce the number of fully national facilities-based carriers to only three. At present, GTE is a reseller of long distance, and is dependent on the facilities of these other providers. Although GTE hopes to transition some of its long distance traffic onto its own network, GTE's customer base alone will not support a fully national facilities-based network. The addition of traffic generated by Bell Atlantic's own long distance customers will increase GTE's ability to construct its own national long distance network to compete with the Big Three.
Wireless The wireless businesses of GTE and Bell Atlantic also are largely complementary, and will allow the combined company to offer a nationwide wireless service on a par with other providers such as AT&T Wireless, Sprint Spectrum and Cellular One.
There are a limited number of places where the two companies have overlapping cellular properties, or where the wireless interests of the combined company would exceed the FCC's spectrum cap. Where there are cellular overlaps--El Paso, Tex., Las Cruces, N.M., and Greenville and Anderson, S.C.--the companies will divest one of the conflicting cellular properties. The companies also plan to reduce their combined wireless holdings to comply with any then-applicable spectrum cap rules.

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Summary
The companies hope to close the merger within 12 months. Because this merger involves the best possible combination of local exchange carriers, in no event should the FCC address this merger any later than it addresses the SBC-Ameritech merger. Ultimately, we are confident that the more the FCC learns about the proposed merger the more strongly it will conclude that the merger is in the public interest.
END

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Magalie Roman Salas* (orig. and 12)
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

International Transcription Service, Inc.*
Attn: Duplicating Contractor
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Washington, D.C. 20036

Jeanine Poltronieri*
Wireless Telecommunications bureau
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Radhika Karmarke*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Janice Myles*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Chief* (2 copies)
International Bureau
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Michael Kende*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

To-Quyen Truong
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Lisa Choi*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Bill Dever*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Cecilia Stephens (w/diskette)*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

William P. Barr
Executive Vice President - Government and
Regulatory Advocacy and General Counsel
GTE Corporation
One Stamford Forum
Stamford, CT 06904

James R. Young
Executive Vice President - General Counsel
Bell Atlantic Corporation
1095 Avenue of the Americas
New York, NY 10036

Teri Lee Amaya

*Served via hand delivery